APPENDIX A

Katherine JEFFRIES, et al.,
Plaintiffs-Appellees,

v.

GEORGIA RESIDENTIAL FINANCE AUTHORITY,
Harriet J. Macklin, etc.,
Defendants-Appellants.

No. 81-7389.

United States Court of Appeals,
Eleventh Circuit.

June 14, 1982.

Appeal from the United States District Court for the Northern District of Georgia.

Before INGRAHAM, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

This appeal involves a review of the constitutionality of eviction procedures administered by the Georgia Residential Finance Authority (GRFA) for tenants receiving benefits under the Section 8 Existing Housing Assistance Payments (HAP) Program of the U.S. Department of Housing and Urban Development (HUD). We affirm.

BACKGROUNL

A. Proceedings Below

This case arose from the mid-term termination of leases and the initiation of eviction proceedings by a private landlord, Taptich, against his tenants, who are participants in the Section 8 Existing HAP program administered for HUD by GRFA. In July, 1979, the tenants filed

this class action suit against GRFA, the Director of GRFA's Section 8 program, the GRFA Rockdale County Section 8 Program Area Administrator, the Secretary of HUD, and the Director of HUD's Atlanta office, in their official capacities, and against Taptich. In seeking declaratory and injunctive relief, plaintiffs challenged a HUD regulation, 24 C.F.R. § 882.215 (1981), as violative of the fourteenth amendment due process clause. This regulation sets out eviction procedures for tenants receiving benefits under the Section 8 program.

The district court certified a plaintiff class which included Section 8 Existing HAP tenants with minimum one-year term leases and thirty-day notice termination clauses and who were threatened with mid-term lease terminations. The district court granted declaratory relief to the tenants and held: (1) that the lease terminations and evictions comprised sufficient state action to invoke the fourteenth amendment's due process clause, despite the involvement of the private landloard; (2) that the Section 8 tenants had a constitutionally protected property interest in continued occupancy of their rental units throughout their lease term, an interest which the government could not deprive them of without affording them due process of law; and (3) that landlord-initiated mid-term lease terminations could occur only after GRFA found good cause. *Jeffries v. Georgia Residential Finance Authority*, 503 F.Supp. 610 (N.D. Ga.1980).

B. The Section 8 Existing HAP Program

In enacting Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, Congress established the Section 8 Existing Housing Assistance Payments Program,

42 U.S.C. § 1437f (1978), which supplies rent subsidies. The purpose of the Section 8 program is to aid lower income families in obtaining a decent place to live and to promote economically mixed housing. 42 U.S.C. § 1437f(a). The program is implemented by regulations at 24 C.F.R. Part 882.

HUD and a local public housing agency (PHA) such as GRFA administer the Section 8 program. 24 C.F.R. § 882.102. GRFA issues a certificate of family participation to eligible participants who locate a privately owned dwelling that complies with the housing quality standards approvied by HUD. 24 C.F.R. §§ 882.102, 882.103(a), 882.109. The certificate holder then executes a lease with the owner of the private dwelling. GRFA then executes a HAP contract with the owner which covers contract rent, family contributions to rent, assistance payments, maintenance, operations, inspections, and evictions, among other privileges.

Under the lease agreement between the landlord and the tenant, the tenant pays a certain percentage of the rent and utilities in proportion to the tenant's income. 42 U.S.C. § 1437f(c)(3); 24 C.F.R. § 889.105. GRFA pays the balance of the rent directly to the landlord. GRFA must approve the lease. The term of each lease must be not less than one month nor more than 180 months. 42 U.S.C. § 1437f(d)(2). All GRFA leases are for twelve, twenty-four, or thirty-six months, but contain a clause that allows termination upon thirty-days written notice by either the landlord or the tenant at will.

The HUD regulation governing evictions of Section 8 existing housing tenants, 24 C.F.R. § 882.215, authorized the landlord to notify the tenant of the proposed eviction. Under this regulation's implementing statute, however,

Congress provided that assistance payments contracts between a PHA and an owner of existing housing must provide that "the agency shall have the *sole* right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." 42 U.S.C. § 1437f(d)(1)(B) (emphasis added).[1] The district court thus declared the regulation void for conflicting with the statute because it permitted a private landlord to unilaterally terminate subsidies without good cause.

Appellees (tenants) are GRFA certified program participants. Each tenant entered into a lease with the Midtown Apartments in Conyers, Georgia, for a term of twelve months, subject to a provision allowing either the landlord or the tenant to terminate the lease upon giving thirty-days written notice. Appellant Taptich (owner), the owner of Midtown Apartments, exercised his rights under the thirty-day termination clause and gave notice to the tenants and GRFA that he intended to terminate their leases. GRFA provided no administrative hearing or other relief with respect to the proposed terminations.

II. ISSUES PRESENTED

We must determine (1) whether the participation of the statutorily-created state agency, GRFA, in Section 8 ter-

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[1] The statutory eviction provision for Section 8 existing housing tenants differs from that for new or substantially rehabilitated housing tenants. In the latter two Section 8 programs, the

> contract between the Secretary and the owner . . . shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or approved by the Secretary, with which the owner may contract for the performance of such responsibilities).

42 U.S.C. § 1437f(e)(2).

mination and eviction procedures, constitutes sufficient state action to implicate the due process clause of the fourteenth amendment; (2) whether Section 8 tenants have a property interest in the continued occupancy of their apartments during the terms of their leases so that their private landlords cannot evict them mid-term absent good cause despite a lease provision permitting termination at will be either party on thirty-days written notice; and (3) whether certification of a defendant class of Section 8 landlords is required because the properly certified tenant class challenges termination and eviction provisions in contracts to which the landlords are parties.

III. STATE ACTION

[1] It is well settled that the fourteenth amendment proscription against deprivations of property without due process of law reaches only government action and does not inhibit the conduct of purely private persons in their ordinary activities. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 477 (1974). We must therefore determine whether the involvement of GRFA in the Section 8 eviction procedure can be deemed "state action."

The question whether certain conduct is attributable to a private person or is tantamount to state action is frequently difficult to ascertain, especially where "the hand of the government is clear, but its path toward contract with the individual clouded by the action of a private individual." *Jeffries*, 503 F.Supp. at 613; *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). "Only by sifting facts and weighing circumstances

can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722, 81 S.Ct. at 860.

While the Supreme Court has refused to fashion a precise formula for ascertaining state action, several principles have emerged from the Court's decisions on this subject. First, the state, "in any of its manifestations," must be significantly involved in the private conduct. *Burton*, 365 U.S. at 722, 81 S.Ct. at 860; *Moose Lodge*, 407 U.S. at 173, 92 S.Ct. at 1971. The mere fact that a private entity is subject to extensive and detailed government regulation is not controlling. *Jackson*, 419 U.S. at 350, 95 S.Ct. at 453. Similarly, granting a license or providing essential services is an instance of insignificant state involvement. *Moose Lodge*, 407 U.S. at 173, 177, 92 S.Ct. at 1971, 1973.

[2] The relevant inquiry is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453. The private citizen's conduct may be attributable to the state where the government affirmatively facilitates, encourages, or authorizes the objectionable practice. *See, e.g., Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 166, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185 (1978) (warehousemen's sale pursuant to state law providing procedure for conversion of lien to good title is not state action where state has not compelled sale of bailor's goods, but merely has announced circumstances where courts will not interfere with private sale); *Jackson*, 419 U.S. at 357, 95 S.Ct. at 456 (state not sufficiently connected with challenged termination of service by private utility where utility initiated practice

which state merely approved but did not order); *Moose Lodge*, 407 U.S. at 173, 92 S.Ct. at 1971 (state action exists where government overtly or covertly encourages practice, such as where existence of state law is tantamount to state having commanded the result); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 359 (5th Cir. 1977) (no federal action in nonjudicial foreclosure of HUD-assisted mortgate where HUD mortgage form authorized foreclosure by private power of sale as well as by judicial foreclosure).

[3] The owners urge that the present case is devoid of any significant state involvement, whether in the form of a "symbiotic relationship" between landlord and state, as in the lease arrangement in *Burton*, or as manifested by governmental compulsion to engage in the challenged act, rather than mere acquiescence in private conduct as in *Flagg Brothers*, *Jackson* and *Roberts*. The owners argue that GRFA does not compel the landlord to exercise his rights under the thirty-day clause; the private landlord acts on his own initiative. By furnishing the lease which permits termination by another party upon giving notice, GRFA merely acquiesces in the landlord's decision to exercise the choice provided. The owners assert that GRFA's issuance of a notice to vacate is a purely ministerial act which does not comprise the overt act causing eviction. The owners also contend that the leasing of rental units by private landlords to Section 8 tenants is not a "public" or "sovereign function" which gives rise to a finding of state action. Finally, the owners assert that the thirty-day termination clause arises solely from a bargain between the landlord and the Section 8 tenant.

We agree with the district court that GRFA "has so far insinuated itself with the private owner in carrying out the challenged eviction procedure" that the nexus between

the state and the private action "is both firm and close." The evictions therefore are not purely private and without constitutional ramifications. We recognize that intimate government involvement in the form of significant regulation or provision of benefits will not necessarily mandate a finding of state action absent a close nexus between the state and the eviction of the Section 8 tenants. *Jackson*, 419 U.S. at 350-51, 95 S.Ct. at 453; *Joy v. Daniels*, 479 F.2d 1236, 1238 & n.3 (4th Cir. 1973). We hold, however, that these factors and other evidence of state involvement, support the district court's conclusion that such a nexus exists.

As the district court noted, both the Housing Act and its legislative history indicate tenancy termination and eviction under the Section 8 Existing Housing Program implicate state action. The clear import of the statutory language establishes responsibility for lease termination and eviction with the state. The statute explicitly provides that "the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." 42 U.S.C. § 1437f(d)(1)(B). The PHA herein, GRFA, is a statutorily-created instrumentality of state government. In enacting the 1974 amendment, Congress stated its intent "that primary responsibility for carrying out the leasing program should be vested in public housing agencies." S.Rep.No. 693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong., & Ad.News 4273, 4314. By speaking of the "discretion" invested in the public housing agencies in making certain important decisions under Section 8, and by expressing a "requirement that a public housing agency has the *right* to make the determination in question," Congress made clear that the role it envisioned for the PHAs under the Act is not of the ministerial

nature urged by the owners.

In addition to the statute's explicit requirement of state action for effectuating evictions of Section 8 tenants, GRFA plays a pervasive role in the administration and operation of the Section 8 program. GRFA determines the eligibility of prospective tenants, 24 C.F.R. § 882.116(c), informs landlords and tenants of their rights and responsibilities, 24 C.F.R. § 882.116(f), reviews and approves leases between landlords and tenants, 24 C.F.R. § 882.116(j), inspects and certifies housing as meeting HUD standards, 24 C.F.R. § 882.116(o), and authorizes evictions. 24 C.F.R. § 882.116(p).

Further, GRFA maintains a direct contractual relationship with the Section 8 landlord who benefits thereby both from the rent subsidy payments and the assurance that he will be reimbursed for portions of the rent if the tenant vacates the unit in violation of the lease or for other unpaid amounts owing under the lease. 42 U.S.C. § 1437f (b)(1); 24 C.F.R. §§ 882.105(b), 882.112(d). This contractual relationship benefits the state as well by providing housing for low income families who could not otherwise afford a decent place to live without assistance. We agree with the district court that "[t]his privity of contract and conferring of mutual benefits results in a concert of action sufficient to be designated state action under *Burton*."

This case also is distinguishable from *Flagg*, which was marked by the total absence of overt official involvement, and from *Jackson*, where the state's only involvement was to approve a termination plan. In this case, the state may veto the private landlord's request to terminate occupancy, but otherwise must take the affirmative step which is the prerequisite to legal eviction. The owner's reliance on

Roberts also is misplaced. In that case, the private mortgagee controlled the exercise of its power of foreclosure and exercised that power on its own intiative and independently of the government. The government did not prescribe the method of foreclosure and did not regulate that process in any manner. On the other hand, the instant case involves governmental defendants who authorize the eviction and issue the notice to vacate, and implicates actual and mandatory state action. Not only does the state regulate the exercise of rights under the thirty-day clause, but a private party may not complete eviction without state approval.

Finally, the circumstances of the present case meet the "public functions" test. *See Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (passageways in privately-owned shopping center not public places, nor is operation of privately-owned shopping center an exclusive governmental function); *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (administration of private discriminatory trust by public officials involves state action); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (streets in company-owned town held public, even though privately-owned). GRFA's purpose is to build, rehabilitate, finance, and lease housing by administering the Section 8 program. In authorizing evictions, the authority thus acts pursuant to its public function. Moreover, the former Fifth Circuit has acknowledged that housing is a governmental function. *Roberts*, 556 F.2d at 359. "[W]hen a specific governmental function is carried out by heavily subsidized private firms whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration

of state action fairly attaches." 556 F.2d at 359 (citing *McQueen v. Druker*, 317 F.Supp. 1122 (D.Mass.1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971)).

IV. THE SUBSTANTIVE PROPERTY INTEREST

[4] The district court held that Section 8 existing housing tenants have a constitutionally protected property interest in the continued occupancy of their rental units until the end of their lease term. The court held that despite the thirty-day termination clause, private landlords may only terminate tenants' leases mid-term upon a determination by GRFA that "good cause" exists. We affirm and thereby join those courts which have found that Section 8 tenants have constitutionally protected property rights in an expectation of continued occupancy and receipt of rent and utility subsidies. *See Swann v. Gastonia Housing Authority*, 502 F.Supp. 362, 365 (W.D. N.C.1980), *aff'd in part*, 675 F.2d 1342 (4th Cir. 1982); *Brezina v. Dowdall*, 472 F.Supp. 82, 85 (W.D.Ill.1979).

The owners contend that the finding of such an entitlement contravenes the Section 8 statute, HUD regulations, the lease, and state law. They note that the Section 8 statute authorises a lease term as short as one month and that implementing HUD regulations, which are entitled to deference, provide for one to three year leases. In addition, the owners point out that the regulations permit mid-term termination by either party upon thirty-days written notice. The tenants' leases also provide for termination by either party upon thirty-days notice, and Georgia courts have interpreted similar provisions to permit termination by either party at will, without cause.

The tenants may claim procedural due process rights under the due process clause if they have a substantive

property interest in continued occupancy. *Joy*, 479 F.2d at 1239; *Swann*, 502 F.Supp. at 365; *see Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . ." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. A property interest in a benefit may be established though existing rules or mutually explicit understandings that support the claim of entitlement to the benefit, or through the construction of statutes and regulations which define and delimit the interest asserted. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). We thus review the applicable statutes and regulations in evaluating the due process rights of appellees.

[5] It is well settled that a protected property interest arises where a government benefit may be withdrawn only for cause. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 11, 98 S.Ct. 1554, 1561, 56 L.Ed.2d 30 (1978); *Arnett v. Kennedy*, 416 U.S. 134, 151, 94 S.Ct. 1633, 1642, 40 L.Ed.2d 15 (1974); *Glenn v. Newman*, 614 F.2d 467, 471 (5th Cir. 1980). The district court found that the statute creating the Section 8 program was the primary source of the legitimate expectation that a Section 8 tenant would not be evicted absent good cause. 42 U.S.C. § 1437f. While subsection (d)(1)(A) vests the responsibility of tenant selection with the owner, subsection (d)(1)(B) states "the agency shall have the sole right to give notice to vacate, with the owner having the right to make repre-

sentation to the agency for termination of tenancy." The trial court found that these subsections together implicitly grant the PHA absolute authority in terminating tenancies and authorizing evictions. The court noted that vesting the agency with the sole authority to issue the notice to vacate would be meaningless unless the agency actually reviewed the cause advanced by the owner in seeking eviction. Indeed, it is reasonable to implicitly require just cause where the agency itself issues the notice.

Similarly, if Congress had intended to permit termination at will be the owner, it would be useless to require the owner to make representations to the agency and to impose the administrative burden of issuing notices to vacate on the PHA. The owner's duty to make representation also demonstrates the need to assess the propriety of instituting eviction.

The district court also relied on the statutory framework to support its interpretation. In addition to the existing housing program, the Act provides financial assistance for newly constructed and substantially rehabilitated dwellings. With respect to the latter programs, the Act grants the private owner explicit authority to terminate tenancies. 42 U.S.C. § 1437f(e)(2).

The private owner's rights in the existing housing program, however, are restricted to the right to *seek* lease termination and, in so doing, to make representation to the PHA. The PHA has the sole authority to give notice to vacate. Although the legislative history does not indicate why Congress differentiated between the three programs, we hold that the district court did not err in finding that Congress intended a different result in the existing housing program by providing a distinct termination mechanism. The court correctly implied a good cause

requirement as a prerequisite to GRFA's issuance of a notice to vacate.

This conclusion is buttressed by the fact that GRFA's involvement in the private landlord-tenant relationship is confined to instances of premature lease termination, rather than participation in initial lease formation and natural expiration of the lease. The court also correctly recognized that arbitrary evictions would defeat the Act's goal by precluding the poor from taking full advantage of federal rent subsidies for obtaining a decent place to live and by interfering with the policy of promoting economically mixed housing. In the face of arbitrary eviction, the mere provision of federal rent subsidies without attendant due process protections would hardly promote the implicit purposes of assuring "an atmosphere of stability, security, neighborliness, and social justice." *Joy*, 479 F.2d at 1240.

The owners also argue that since the statute permits the PHA and the landlord to enter into contracts for a term as short as one month, that a lease between a tenant and the landlord creates a legitimate expectation of tenancy limited to one month, regardless of the length of the lease. 42 U.S.C. § 1437f(d)(2). We fail to see how the provision for a minimum one month lease term equates the legitimate expectations held under a one month lease with those held under a one year lease. All the leases in this case were for more than a month.

The owners also argue that the HUD regulation implementing the Section 8 program lessens any alleged legitimate expectation of continued occupancy. *See* 24 C.F.R. § 882.215. They urge this court to accord deference to the regulation which permits the owner to send the notice to vacate and which imposes no good cause requirement for

mid-term lease termination. The statute, however, mandates that only the PHA has the authority to issue a notice to vacate. 42 U.S.C. § 1437f(d)(1)(B). The district court thus declared this regulation null and void for conflicting with the statute.[2] Because the eviction regulation is void, we hold that it has no bearing on the tenants' legitimate expectation of mid-term termination only for cause.

The owners also rely on new HUD regulations providing that subsidized tenants have an entitlement of occupancy. The regulation, 24 C.F.R. § 450.3 (1981), states that the landlord may not terminate any tenancy in a subsidized program except upon grounds providing good cause. As proposed, the regulation encompassed the three Section 8 programs. 41 Fed.Reg. 16924, 16924-26 (1976). The final regulation, however, excluded the Section 8 new construction and substantial rehabilitation programs from its coverage because inclusion would "greatly reduce private interest in the program" and because "the Section 8 Program can serve the nation best by vesting private owners the fullest measure of management responsibilities." 41 Fed.Reg. 43330 (1976). We find this language unpersuasive, because it refers only to the new and substantially rehabilitated housing programs which delegated all management, ownership and maintenance responsibilities to the private landlord.

HUD went on to summarily exclude the Section 8 existing housing program from the ambit of the new regulation "to be consistent with the basic philosophy of the program." 41 Fed.Reg. 43330. In so doing, HUD reasoned

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[2] Appellants do not contest on this appeal the trial court's ruling that the HUD regulation is void for conflict with its implementing statute.

that this program is premised on the so called "finders-keepers" concept which permits tenants, once found eligible, to seek housing in the broadest possible area. 41 Fed.Reg. 43330; *see* 24 C.F.R. § 882.103. HUD thus excluded existing housing tenants from the protections afforded by 24 C.F.R. § 450.3 because an evicted tenant is free to move to another dwelling unit and continue to receive benefits. 41 Fed.Reg. 43330. The regulation, however, ignores the separate treatment which Congress explicitly accorded to the existing housing program with respect to the role of the PHA in evictions.

Moreover, Congress recently amended 42 U.S.C. § 1437f(d)(1)(B) by requiring "good cause" for mid-term evictions. Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, § 326(e)(1), 95 Stat. 357, 407.[3] The amended tenancy termination provision deleted the requirement that the PHA shall have the sole right to give notice to vacate with respect to the Section 8 existing housing program. In referring to the "good cause requirement," the legislative history speaks of "the procedural and substantive *rights* of the tenant with respect to occupancy of the unit." H.R.Conf.Rep.No.97-208, 97th

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[3] The Omnibus Reconciliation Act of 1981, Pub.L.No.97-35, § 326, 95 Stat. 357, 407 (amending 42 U.S.C. § 1437f(d)(1)(B) (1978)) provides:

(e)(1) Section 8(d)(1)(B) of the United States Housing Act of 1937 is amended to read as follows:

"(B)(i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the secretary; and

"(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause;".

(2) The amendment made by paragraph (1) shall apply with respect to leases entered into on or after October 1, 1981.

Cong., 1st Sess. 694-95, *reprinted in* [1981] U.S.Code Cong. & Ad.News 1010, 1053 (emphasis added). The conferees stated that they did not intend these statutory provisions to govern the landlord-tenant relationship after a landlord has, *in good faith*, terminated his participation in the existing housing program. Although the amendment applies only to leases entered into after October 1, 1981, these statements clarify congressional intent regarding the propriety of implying a good cause requirement in the provision governing the instant case.

For the above reasons, we hold that the district court was correct in concluding that Section 8 existing housing tenants have a protected property interest in their government subsidized leases because their leases may be terminated mid-term only for cause.

V. FAILURE TO JOIN LANDLORD OWNER CLASS

[6] The owners contend that all Section 8 landlords are indispensable parties under Fed.R.Civ.P. 19 [4] because this class action challenges termination and eviction provisions in contracts to which they are parties. The owners further contend that the judgment rendered in the absence of the private landlords as a practical matter impairs their ability to protect their property interests and their

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[4] Fed.R.Civ.P. 19(a) requires joinder of a party if:

(A) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

leases by exercising the termination option. Finally, the owners assert that the named defendant owner has not adequately protected their interests. Since it is no longer feasible to join this defendant class, the owners urge this court to decertify the plaintiff class and vacate the judgment of the district court. Since the named tenant's leases have expired and have not been renewed, rule 19 would require the dismissal of the class action because it is no longer feasible to join the owners. The owners thus argue that the case is moot.

On the other hand, the tenants argue that the landlords are not indispensable parties because they possess no bargaining power with respect to the operation of the Section 8 program or the modification of HUD contracts and leases, and are not actual participants in contract formation. The tenants also rely on the fact that rule 19(d) explicitly excepts class actions from the indispensable party rule. Finally, they argue that failure to join the absent landlords is not error because their interests are identical to and adequately protected by defendants already before this court.

Pursuant to their motion to dismiss and cross-motion for summary judgment, the state defendants argued that, if the court found for the tenants, their request for class-based relief was inappropriate for failure to join an indispensable class of Section 8 owners. State defendants requested that any relief accorded the tenants should be declaratory relief entered for tenants individually. In essence, the state defendants requested the district court to decertify this case as a class action. They neglected, however, to raise an objection on this ground when the court granted class certification.

[7-10] It is a basic principle that a court's judgment will

bind only those who are parties to the suit. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110, 88 S.Ct. 733, 738, 19 L.Ed.2d 936 (1968). The interests of absent parties must be considered in a rule 19 motion governing the joinder of persons needed for just adjudication. *McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980). Failure to raise this issue by proper motion before the trial court does not constitute waiver. 620 F.2d at 51; *Kinball v. Florida Bar*, 537 F.2d 1305, 1307 (5th Cir. 1976). Nevertheless, joinder of an absent class of defendant landlords would serve no purpose under the circumstances of the present case. "When the judgment appealed from does not in a practical sense prejudicially affect the intersts of the absent parties, and those who are parties have failed to object to non-joinder in the trial court, the reviewing court will not dismiss an otherwise valid judgment." *Sierra Club v. Hathaway*, 579 F.2d 1162, 1166 (9th Cir. 1978), *quoted in McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980).

[11] The court's decision on joinder is guided by pragmatic concerns, especially the effect on parties and on litigation. *Smith v. State Farm Fire & Casualty Co.*, 633 F.2d 401, 405 (5th Cir. 1980). Because the state defendants and the owners advanced the same position as the absent landlords would have taken, and because their interests were coextensive, we disagree with the assertion that a disposition in the absence of the private owners may, as a practical matter, impair their ability to protect their interests. *United Transportation Union v. Long Island Rail Road*, 634 F.2d 19, 22 (2d Cir. 1980), *appeal pending*, 452 U.S. 960, 101 S.Ct. 3107, 69 L.Ed.2d 970 (1981).

This case does not challenge the propriety of owner Taptich's actions, nor of the conduct of any other private

owner. *Cf. Boles v. Greeneville Housing Authority*, 468 F.2d 476, 478-80 (6th Cir. 1972) (HUD a necessary party when legality of *its* actions is at issue). Rather, this case embraces a challenge to regulations promulgated by HUD and the rights and responsibilities of the tenants and the PHA under the Section 8 program with reference to eviction procedures. *See Texas & Pacific Railway v. City of New Orleans*, 159 F.2d 77, 78 (5th Cir. 1947). Specifically, the controversy in the instant case relates to the due process right of the tenants to demand an eviction procedure which terminates their entitlement for good cause and which the PHA must follow. Since GRFA must assess good cause in every case, we see no reason why the tenants were not entitled to a declaratory judgment to adjudicate the rights and duties under the eviction provision of the statute. Because issuance of the notice to vacate is a decision solely within the discretion and responsibility of GRFA, the district court correctly found that it could afford complete relief to all of the parties without joinder of a defendant class of owners.

[12] Moreover, the tenants' claim to an entitlement requiring due process safeguards does not necessarily conflict with the claims of absent owners so as to adversely affect their interests. *Cf. McCulloch*, 620 F.2d at 51. Alternatively, when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties. *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940); *see Natural Resources Defense Council, Inc. v. Berklund*, 458 F.Supp. 925, 933 (D.D.C.1978), *aff'd*, 609 F.2d 553 (D.C.Cir.1979) (where environmental organization sought declaratory and injunctive relief against defendant Secretary of Interior in regard to his issuance of preference

right coal leases on federal land, numerous lease applicants who could be adversely affected not indispensable parties).

We find unpersuasive the owner's contention that the absence of other private landlords will subject GRFA to "inconsistent obligations" within the meaning of rule 19(a)(2)(ii). Resolution of the issue in the instant case will result in only one possible obligation: the duty to find the existence of good cause prior to issuing a notice to vacate. *See United Transportation Union*, 634 F.2d at 22; *California Department of Transportation v. City of South Lake Tahoe*, 466 F.Supp. 527, 540-41 (E.D.Cal. 1978). Accordingly, we conclude that the district court properly held that the absent landlords are not an indispensable class.

VI. CONCLUSION

Because we find that the district court properly found (1) that the lease terminations herein constituted state action despite the involvement of a private owner; (2) that Section 8 existing housing tenants had a property interest requiring due process protection in cases of deprivation; and (3) that absent owners were not an indispensable class, we affirm.

AFFIRMED.

APPENDIX B

[Filed in Clerk's Office, December 23, 1980, Ben H. Carter, Clerk; By K. Bates, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

KATHERINE JEFFRIES, on behalf of herself and all others similarly situated, *Plaintiff,* vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY, ET AL., *Defendants.*	CIVIL ACTION NO. C79-1349

ORDER

Plaintiffs, who are hereby certified as a class defined in the court's order of January 28, 1980, are or have been tenants inhabiting homes the rent for which is partially paid with federal rent subsidies. The Section 8 Existing Housing Assistance Payments Program, which supplies the rent subsidies, was established by Congress through enactment of Section 8 of the Housing and Community Development Act of 1974. 42 U.S.C. §1437f. The program is implemented by regulations found at 24 C.F.R. Part 882.

Eligible participants receive a certificate of family participation, 24 C.F.R. §882.12, which permits low income families to participate in the Section 8 program. Once certified, the family must locate a privately owned dwelling that complies with the housing quality standards approved by the Department of Housing and Urban Development (HUD). 24 C.F.R. §§ 882.103(a) and 882.109. When a certificate holder locates a dwelling he submits a request for lease approval. After approval, the Section 8

Existing Housing Assistance Program participant executes a lease with the owner of the private dwelling. The local Public Housing Agency (PHA), which in this case is the Georgia Residential Finance Authority (GRFA), simultaneously or subsequently executes a Housing Assistance Payment Contract with the owner. The assistance contract provides that assistance payments may be paid only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time the family initially occupies the dwelling. The Housing Assistance Payment Contract addresses contract rent, the family portion of the rent, assistance payments, maintenance, operations, inspections, and evictions among other provisions.

A certified family with a lease pays between 15 and 25 percent of its adjusted income for rent and utilities as determined in accordance with 42 U.S.C. §1437f(c)(3) and 24 C.F.R. §889.105. The balance of the rent is paid by GRFA directly to the owner on behalf of the certified family. The lease entered into by the participant must be approved by GRFA and must conform to regulations in order for payments to be made to the owner.

Each lease under the program is also affected by 42 U.S.C. §1437f(d)(2), which requires each contract for an existing dwelling to be for not less than one month nor more than 180 months. All GRFA leases are for terms of 12, 24, or 36 months, but each lease contains a clause that allows termination upon 30 days written notice by either the landlord or the tenant at will.

Because of the clause allowing termination at will, the program as it now operates in Georgia does not require good cause prior to lease termination and thus provides no basis on which a tenant may contest termination of

his lease. The issue in the present case is whether, under the statute, a lease may be terminated without good cause.

Evictions of Section 8 existing housing tenants are covered by 24 C.F.R. §882.215, the only HUD regulation on the subject, which provides:

> The Owner shall not evict any Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner. The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the Family may, within the same period, present its objections to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease. The PHA shall notify the Owner and the Family of its determination within 20 days of the date of the notice to the Family, whether or not the Family has presented objections to the PHA. If the Owner has not received a response from the PHA within 20 days, he shall telephone the PHA and shall be informed by the PHA whether a notice of determination has been mailed. If the PHA informs the Owner that no notice has been mailed within the 20 day period, the PHA shall be deemed to have authorized the eviction.

Congress has provided, however, that assistance payments contracts between a PHA and an owner of existing housing must provide that "the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termina-

tion of tenancy." 42 U.S.C. §1437f(d)(1)(B). Thus, the statute and the regulation are in apparent conflict.

The statutory provision regarding eviction for existing housing tenants is in contrast to that provided in the Section 8 programs for new or substantially rehabilitated housing. In the latter two Section 8 programs the "contract between the Secretary and the owner . . . shall provide that all owners' ip, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or any entity, including a public housing agency, approved by the Secretary, with which the owner may contract for the performance of such responsibilities)." 42 U.S.C. §1437f(e)(2).

All of the plaintiffs have been certified by GRFA as eligible to participate in the Section 8 Existing Housing Assistance Payments Program and were eligible when their leases were terminated or when they received termination notices from their landlord. Each plaintiff entered into a lease with the Midtown Apartments in Conyers, Georiga, for a term of 12 months, but each lease contained a provision allowing either the landlord or the tenant to terminate the lease upon the giving of 30 days notice. Pursuant to the 30-day termination clause, defendant Taptich, the owner of Midtown Apartments, gave notice to plaintiffs that he intended to terminate their leases and simultaneously informed GRFA. GRFA provided no administrative hearing or other relief with respect to the proposed terminations involved in the case. The present litigation ensued.

The essence of plaintiffs' claim is that their due process rights have been violated by the termination procedure involved in GRFA's administration of the Section 8

Existing Housing Program. To evaluate the merits of plaintiffs' contentions properly, the court must systematically address whether or not there has been sufficient state action in this case to implicate the due process clause of the fourteenth amendment, whether or not plaintiffs have a property right in the continued occupancy of their apartments during the terms of their respective leases absent good cause for termination despite the lease provision permitting termination at will, and if so, what processes are required by the Constitution to protect that property right. Therefore, the court will examine each issue separately and sequentially.

I. STATE ACTION

The constitutional prohibition against deprivations of property without due process of law applies only to government action. U.S. Const. amend. XIV. Identical deprivations by private parties are without constitutional implication. Therefore, as a threshold proposition, the court must conclude that there is some form of governmental action before analyzing the substantive property right involved, if any, and the procedural protections available. If there is insufficient governmental involvement in the Section 8 Existing Housing Program, the court's analysis need proceed no further.

Where the hand of government is clear, and its path toward contact with the individual unobstructed, the question of state action is easily resolved. Where, however, the hand of government is clear, but its path toward contact with the individual clouded by the action of a private individual, the question of state action is troublesome and fact-specific. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the

State in private conduct be attributed its true significance." *Burton v. Willmington Parking Authority*, 365 U.S. 715, 722 (1961).

Burton v. Willmington Parking Authority is the controlling case on the issue of state action. In *Burton*, the state of Delaware had leased, through a political subdivision of the state, space in a parking garage to the Eagle Coffee Shoppe, a restaurant that refused to serve blacks. The restaurant was owned and operated solely by private individuals and, other than being located in a public parking garage, had no abnormal contacts with state government. After analyzing the specific facts of the case, including the financing of the garage and benefits conferred by the restaurant and the garage on each other, the Court concluded that the state had "so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Id.* at 725. If, then, GRFA has so far insinuated itself with the private owner in carrying out the challenged eviction procedure, the evictions involved in this case cannot be considered to be purely private and without constitutional importance.

There is unquestionably an important involvement by private landlords in the Section 8 Existing Housing Program as it is administered by GRFA and as it was envisioned by Congress. The government, of course, is intimately involved with the program, but intimate involvement, even significant regulation, will not necessarily result in state action without a close nexus between the state and the eviction of the Section 8 tenant. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The court

finds that such a nexus exists.

The involvement of the federal government is extensive, but when the hand of the federal government acts in the Section 8 program it reaches no further than the PHA. This is consistent with the congressional intent "that primary responsibility for carrying out the leasing program should be vested in public housing agencies." S.Rep. No. 693, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. and Ad. News 4273, 4314. The Section 8 owner, however, has significant responsibilities for the management of his property. Nevertheless, the nexus between the state and the particular action in question in this case, lease termination and tenant eviction, is both firm and close.

The responsibility of the state for lease termination and eviction is undeniable. The statute explicitly provides that "the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." 42 U.S.C. §1437f(d)(1)(B). The PHA involved here, Georgia Residential Finance Authority, is statutorily created and is an instrumentality of state government. Ga.Code Ann. §99-3604. With respect, then, to tenancy termination and eviction, the state action is apparent. Whether or not the agency is actually issuing notices to vacate, as required by statute, its involvement in the eviction process is unequivocal. Should it fail to issue the statutorily required notice to vacate, its failure is no less a logical action than its actual issuance of a notice to vacate. HUD regulations confirm that failure of the state PHA to act is to be viewed as an action and is deemed an authorization of the eviction. 24 C.F.R. §882.215. Since failure of the state to act is regarded as an affirmative authorization of eviction

under the program as administered, the administrative authorization of inaction no less constitutes an action than an actual authorization of eviction. Klein & Schrider, *Procedural Due Process and the Section 8 Leased Housing Program*, 66 Ky. L.J. 303, 335 (1977).

Aside from the direct involvement of GRFA in the evictions of plaintiffs, there is a nexus between the state and the Section 8 owner sufficient to constitute state action under *Burton*. It is important to note that GRFA screens the prospective tenants, 24 C.F.R. §882.116(c), and reviews the lease between the Section 8 owner and the Section 8 tenant, 24 C.F.R. §882.116(j), as well as authorizes evictions. 24 C.F.R. §882.116(p). In addition, GRFA is in a direct contractual relationship with the Section 8 owner, 42 U.S.C. §1437f(b)(1), who benefits both from the rent subsidy payments directly and from the assurance that those payments will continue under some circumstances despite vacancy. 24 C.F.R. §882.105 (b). The benefits of this contractual relationship flow to the state as well. The Section 8 owner provides housing for those state citizens who, by definition, could not afford a decent place to live without assistance. This privity of contract and conferring of mutual benefits results in a concert of action sufficient to be designated state action under *Burton*.

The court has discovered one similar case involving a state action question much like the one here. *Flamm v. Real-Blt, Inc.*, 168 Mont. 351, 543 P.2d 190 (1975), *cert. denied*, 425 U.S. 941 (1976). In that case, the Supreme Court of Montana found that an eviction by a private landlord receiving federal benefits in the form of mortgage insurance and rent subsidies administered by the Federal Housing Administration was not state action and did not

implicate the due process clause. The lease involved in that case contained a 30-day termination clause as do the leases involved in the present litigation. The Supreme Court of Montana, of course, is not binding on this court, nor is its opinion here persuasive. Even if it were, however, the present case is distinguishable since state action is explicitly required by the federal statute to effect an eviction of a Section 8 tenant. This direct involvement by the state allows the court to avoid a complex search for some hypothetical nexus or intertwining relationship between the state and the private party who has actually acted.

Flamm was reviewed, albeit in a cursory fashion, on plaintiff's application for a stay of the Montana court's decision. *Flamm v. Real-Blt, Inc.*, 424 U.S. 1313 (Rehnquist, Circuit Justice, 1976). Justice Rehnquist denied the stay on the basis that the full Court would not grant certiorari because the 30-day termination clause that appeared in the lease would make it unnecessary to reach the state action issue. Upon careful consideration, this court does not believe its decision should be greatly affected by Justice Rehnquist's opinion in *Flamm*. Since plaintiffs assert that the 30-day clause violates the federal statute that creates the program involved here, the court cannot avoid the constitutional issue and the preliminary state action issue as could Justice Rehnquist.

This court must conclude, therefore, that there is state action in this case. This conclusion is supported by an earlier line of cases in which state action was found to exist where private landlords acted in government subsidized housing programs administered by the Federal Housing Administration. *See, e.g., Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973). The court cannot distinguish

the *Joy* line of cases as having any less government involvement than the present case. In fact, the court cannot see that the state's involvement in evictions under the Section 8 Existing Housing Program could be any greater.

II. THE SUBSTANTIVE PROPERTY INTEREST

Having determined that state action is involved in this case, the court must determine whether or not plaintiffs have a property interest in Section 8 Existing Housing Program leases that cannot be terminated without cause prior to the end of the lease despite the current lease clause that permits termination at will. Such a property interest in a government benefit would certainly be nontraditional, but the concept of property is not static. The Supreme Court has provided an analysis for determining whether or not a particular interest, though nontraditional, may be deemed a property interest subject to the protections of due process.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbirarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Unless plaintiffs' interest is founded on such an objective basis or legitimate expectation, though it be interferred with by the state, it is not protected by the due process clause.

In *Roth*, the Supreme Court examined the system by which a state university chose to hire or rehire nontenured

teachers. The Court found that under state law the decision whether to rehire a nontenured teacher for another year was left to the unfettered discretion of university officials. Therefore, the Court concluded that there was no ligitimate expectation of being rehired. Consequently, the Court failed to find a property interest in *Roth* because there was no more than an abstract need or unilateral expectation of the government benefit at issue.

On the other hand, the Court demonstrated in *Perry v. Sindermann*, 408 U.S. 593 (1972) that a property right in a government benefit may arise implicitly. In other words, an explicit recognition of a property right in a government benefit by positive law is not necessary in order for an interest to be greater than an abstract need or unilateral expectation. Various sources may provide the objectivity necessary to classify an interest as a legitimate expectation and therefore a property interest protected by the due process clause.

The parties have made much of a recent case, *O'Bannon v. Town Court Nursing Center*, ____ U.S. ____, 100 S.Ct. 2467 (1980), as bearing on the question of whether an individual's interest in remaining in a particular dwelling unit the cost of which is subsidized by federal funds constitutes a legitimate expectation or property right. *O'Bannon* addressed the issue of whether certain elderly residents of a nursing home have a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with care thus requiring the residents to move. The Court held that though such a revocation may be harmful to the residents, the residents have no constitutional right to participate in the revocation proceedings. *O'Bannon* is a case in which third parties affected by government action against an-

other seek to intervene in that action, and would govern the present case if our facts involved private Section 8 tenants seeking to intervene in proceedings brought by HUD or GRFA to revoke the eligibility of a Section 8 landlord to receive housing assistance payments. Our case, however, involves government action directly against the party involved in the pending litigation. *O'Bannon* does not, therefore, require this court to find that plaintiffs lack a property interest.

Rather, the reasoning expressed in *O'Bannon* would lead one to conclude that the Supreme Court would unanimously find a property interest held by plaintiffs in the present case. All members of the Court agree on the general due process maxim that when a government benefit may only be withdrawn for cause, a legitimate expectation, entitlement, or property interest arises. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980). If the present case fits within the maxim, due process rights attach to protect a tenant's legitimate expectation. Therefore, the court's task is to determine whether or not a Section 8 tenancy may be terminated during midterm only for cause under the federal statute creating the Section 8 Program.

The right to termination of a government benefit only for cause, of course, does not arise from the Constitution itself, *Goss v. Lopez*, 419 U.S. 565, 573 (1975), but such rights may be statutorily created. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Though it is a close question, the court concludes that the statute, regulations, and lease, taken together, yield a legitimate expectation that one will not be evicted from his home inhabited under a Sec-

tion 8 existing housing lease without good cause.

The primary source of this expectation is the statute creating the Section 8 program itself. 42 U.S.C. §1437f. The key provisions of the statute are subsections (d)(1)(A) and (B), which state:

> (d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that—
>
> (A) the selection of tenants for such unit shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency;
>
> (B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy.

When these subsections are read in conjunction, they implicitly guarantee that the local public housing agency, here GRFA, has absolute authority in terminating tenancies and authorizing evictions.

Such authority would be meaningless were GRFA not to exercise some review. If Congress had not intended that the PHA actually review the cause for a Section 8 owner's desire to terminate a tenancy, it presumably would not have required a meaningless formality by providing that only the agency shall have the right to give a notice to vacate. Furthermore, the Section 8 owner may only "make representation to the agency for termination of tenancy." The court interprets this language to mean that good cause is required before termination, and the Section 8 owner may only make representation to the agency that good cause for lease termination exists. If

termination at will by the owner had been contemplated by the statute, there would have been no need to require the owner to make representation to the agency and to require the agency to bear the burden of issuing notices to vacate. If good cause were not required to terminate the tenancy, the owner would have nothing to make a representation about.

The structure of the legislation as enacted by Congress supports this conclusion. In addition to the existing housing program, there are two other Section 8 programs. Congress explicitly provides that in both of the other programs "all ownership, management, and maintenance responsibilities, including the selection of tenants and the *termination of tenancy*, shall be assumed by the owner." 42 U.S.C. §1437f(e)(2) (emphasis added). Congress, then, has created three similar programs. In two of them, the private owner has explicit authority to terminate tenancies. In the other, only the PHA has the right to give notice to vacate and the private owner may do no more than seek the termination of the tenancy. The court does not believe that Congress explicitly provided for termination of tenancy by owners in the new or substantially rehabilitated housing programs and, by providing that the agency should have the sole right to give notice, intended the same result in the existing housing program. Therefore, the court concludes that Congress implicitly required that PHAs review an owner's representations for termination of tenancy for good cause and issue notices to vacate only when good cause is found.

Furthermore, Congress only provided that the PHA take an active involvement in the midterm termination of leases. PHA involvement is not required when a landlord-tenant relationship is formed. The PHA is charged

with certain administrative duties such as approving the lease, 24 C.F.R. §882.116(j), but "the selection of tenants . . . shall be the function of the owner." 42 U.S.C. §1437f(d)(1)(A). Nor is government action required by the statute should a Section 8 landlord desire to end the landlord-tenant relationship when the term of a lease has run. Thus, defendants' statutory interpretation that Congress intended the Section 8 program to operate in the same manner as a totally private landlord-tenant relationship finds expression in the legislative scheme. But the fact that Congress omitted PHA involvement from the formation and termination of the landlord-tenant relationship at the natural beginning and end of the lease forming the basis for that relationship and included PHA involvement in the unnatural termination of the landlord-tenant relationship strengthens the conclusion that some reason or good cause must exist to prematurely terminate a Section 8 landlord-tenant relationship. This implicit congressional intention, embodied in the statutory language, is sufficient in the court's view to create a legitimate expectation that falls within the purview of due process protections.

The court's conclusion is strengthened by the general policy of the Section 8 program. According to the statute, the program is for "the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. §1437f(a). Arbitrary evictions upon the giving of 30 days notice would subvert this goal by interfering with the objective to aid low income families in obtaining a decent place to live with any security and by interfering with the policy of promoting economically mixed housing with any stability. Klein & Schrider, *supra* at 344. "It is apparent, from the statutory language and the regulations promul-

gated to effect the Act, that the purpose of the Act is to enable poor and elderly persons . . . to take full advantage of housing assistance offered by the federal government." *Brezina v. Dowdall*, 472 F.Supp 82, 85 (W.D. Ill. 1979). Arbitrary evictions hardly foster the goal of allowing citizens to take full advantage of federal rent subsidies.

The stated purpose of the Section 8 program is not unlike the stated purposes of conventional government housing projects or other federal rent subsidy programs provided for low-income residents of private housing. Among the implied purposes of the Section 8 program, as in other federal hosing programs, is the purpose to assure an atmosphere of stability, security, neighborliness, and social justice. *Joy*, 479 F.2d at 1240. Arbitrary evictions contradict the goal of social justice, foster an atmosphere of hostility, and contribute to feelings of anomie and alienation. Note, *Procedural Due Process in Government-Subsidized Housing*, 88 Harv. L.Rev. 880 (1975). This policy analysis supports the conclusion that the expectation of plaintiffs is more than merely unilateral.

Since contracts between a PHA and an owner under the statute may be for a term as short as one month, 42 U.S.C. §1437f(d)(2), the owner may, *a priori*, enter into a lease with a Section 8 tenant for a term of only one month. If does not follow, however, from the fact that a lease may permissibly be only one month in duration under the statute, that a tenant with a one year lease may only legitimately expect occupancy for one month at a time. Nor does it follow from the fact that a lease may only be for one month that Congress intended for the tenant to only have a legitimate expectation of tenancy undisturbed for one month regardless of the length of his lease. If there is any difference at all between a one month lease

and a one year lease, it must be the legitimate expectations held under them.

Of course, the existence of the Section 8 eviction regulation, 24 C.F.R. §882.215, could lessen the objective legitimacy of the tenant's expectations. The eviction regulation promulgated by the Department of Housing and Urban Development, however, is in fatal conflict with the statute enacted by Congress. Under the statute, the PHA is the only party that can give a notice to vacate. 42 U.S.C. §1437f(d)(1)(B). The regulation, however, permits the owner to send the notice to a tenant. 24 C.F.R. §882.215. This conflict has already been noted in *Brown v. Harris*, 491 F.Supp. 845 (N.D.Cal. 1980). "The agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience." *Id.* at 847. An administrative regulation that does so and that conflicts with the statute to which it is pursuant, is of no import and is but a nullity. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). Since the eviction regulation is void, then, the tenants' ligitimate expectation of midterm termination only for cause is not lessened. Plaintiffs, as Section 8 existing housing tenants, therefore have a property interest of which state government cannot deprive them without affording the tenants due process of law. U.S.Const. amend XIV.

III. THE PROCESS DUE

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court, however, has not set down any particular process in stone. Rather, the application of due process is a practical

exercise and calls for flexibility. "It has been said so often . . . as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* But the Supreme Court's commitment to some form of hearing before an individual is deprived of an interest in property has been constant and unyielding, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and that Court has suggested an analytical framework for applying the due process clause to particular situations. Three district factors must be weighed in a balancing approach. First, the court must consider the private interest that will be affected. Second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or alternative procedural safeguards should be considered. Finally, the government interest, both the physical and administrative burdens placed on government agencies and the government function involved, is to be weighed and enters into the balancing formula. *Id.* at 335. This court will structure its analysis accordingly.

The severity of the deprivation of the property interest at stake provides an initial measure of the degree of the procedural protection that the individual is entitled to demand from government. The interest at stake here, an individual's interest in remaining in his home, is unquestionably substantial. *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2nd Cir. 1973). Initially, the court notes that an individual's interest in his home is traditionally afforded a certain degree of sanctity in our legal system. That sanctity finds its expression, among other places, in the fourth amendment, and it is no less entitled to recognition here.

Moreover, the fact that the housing involved in this case is provided by the government for those living at subsistence levels implicates special concerns. In this context, the normal burdens associated with the loss of one's home are of heightened intensity and additional burdens not present in normal circumstances are implicated. "The loss of assisted housing is likely to impose financial hardship on the evicted tenant. In addition to financial strain, the evicted tenant will suffer psychological deprivation relating to a change in neighbors and familiar surroundings. If a tenant is evicted for being undesirable, it is likely that he will be unable to qualify for other public housing or even private housing if the stigma of being undesirable follows him." Klein and Shrider, *supra* at 344-45 (footnotes omitted).

The aggravated nature of need and deprivation in this case increases the weight to be afforded to the deprivation in the balancing scheme. *Goldberg v. Kelley*, 397 U.S. 254 (1970). Even the fact that a particular deprivations of grave consequence, however, is not determinative. "Procedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken* or *unjustified* deprivation of . . . property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added). Therefore, the court must consider not only the weight of the deprivation but the risk that the deprivation may be made erroneously. The flexible rules of due process are shaped by the risk of error inherent in the truth-finding process and the rules are meant to minimize erroneous deprivations by enabling individuals to contest the basis upon which the government proposes to deprive them of a property interest. *Id.* at 260. "If severity of deprivation is massive but the type of issue in dispute makes a requested

procedure useless, then the interest of the individual in obtaining that procedure should be totally discounted." Note, *supra* at 1519 (footnote omitted).

Furthermore, procedural due process rules are shaped according to the risk of error in the generality of cases rather than in unusual cases. *Mathews*, 424 U.S. at 344. Therefore, the court turns its attention to the value of due process rules in the particular context of the Section 8 Existing Housing Program.

In some cases information relevant to a decision to deprive an individual of a property interest and sufficient information to make the risk of error negligible may be obtained solely in writing. In fact, pertinent information may be more amenable to written than oral presentation in certain cases such as Social Security disability benefits. 424 U.S. 319. In *Mathews v. Eldridge*, for instance, the decision that affected the property right in Social Security disability benefits was based on highly technical data. The decision was easily focused and the information on which it depended was easily documented. The key information, in fact, was a medical report. Although differing medical reports could have been obtained, credibility was not an important issue and the dispute over deprivation was not likely to turn on disputed issues of fact. In cases that are not technical and focused, however, written submissions are likely to be inadequate. *Id.* at 343.

The termination of a Section 8 tenant for good cause is likely to be highly factual rather than technical, and the generality of cases is likely to involve determinations of credibility. By definition, Section 8 benefits are awarded to people with very small incomes. The court is aware that these individuals are unlikely to be advanced in educational attainment or highly skilled in the use or the

techniques of English composition. This, of course, is not uniformly true, but as discussed above, the requisite due process rules must be defined in accordance with the generality of cases rather than in accordance with rare cases. The court is also aware that even among those highly educated, the ability to effectively present ideas in writing is rare. Therefore, to require Section 8 tenants to do so seems an especially futile exercise. To rest a decision regarding the deprivation of a Section 8 tenant's property right on a purely written presentation, is highly likely to result in error from the omission from consideration of unarticulated or unskillfully articulated arguments. Furthermore, written presentations will totally neglect questions of credibility, upon which the determinations of fact in a highly fact-specific dispute are likely to turn. *Goldberg*, 397 U.S. at 269.

This court finds, in agreement with *Goldberg v. Kelley*, that as in "almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* Therefore, an oral hearing is constitutionally necessary before a Section 8 tenancy may be terminated during the term of the lease. Balanced against the factors of the weight of the private interest and the risk of erroneous deprivation, is the weight of the governmental interests involved, the administrative burden that will be created by a hearing procedure, and the governmental function to be served.

Requiring GRFA to conduct a full evidentiary hearing in order to allow a landlord to terminate a Section 8 tenant would significantly add to the agency's administrative burden. The costs associated with this burden include both the expense of providing a large number of

hearings and the cost of continuing benefits to those tenants properly terminated for good cause. "We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347. Nor can administrative costs be considered in a vacuum. Administrative expenses are most likely to be met, not by increased funding for GRFA, but by decreasing the rent subsidy benefits currently being paid to eligible Section 8 families or that may become available to pay rent subsidies in the future. Thus, the cost of the hearing procedure is likely to be at the direct expense of the services provided by GRFA, and thus at the direct expense of those in need of housing assistance. This, the court believes, is neither in the interest of plaintiffs nor other Section 8 tenants.

The court must also consider the governmental interest in providing Section 8 rent subsidies, and that interest weighs into the due process balance that the court must strike. "Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty, to ourselves and our Prosperity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it." *Goldberg*, 397 U.S. at 265. The governmental function and interest in the case of Section 8 rent subsidies for existing housing are identical to those expressed by the *Goldberg* Court.

Furthermore, in support of the Section 8 program and policy, the government has an interest in encouraging the participation of private owners. "If governmental due process standards are imposed on landlords, many pri-

vate owners may be uninterested in participating in the program, especially if they can easily rent the same unit to nonassisted families who could be evicted without due process procedures." Heen, *Due Process Protection for Tenants and Section 8 Assisted Housing*, 12 Clearinghouse Review 1, 15 (1979). In sum, then, the government has an interest in continuing the rent subsidies program under the Section 8 Existing Housing Program. The court must consider the governmental interest in maintaining the level of Section 8 services and in encouraging the participation of private landlords, without whom the program could not function at all. The overall governmental interest in promoting the general welfare and in continuing to provide decent and safe housing for low-income families, like the individual interest involved, is heavy. Some balance must be struck.

The court believes that some form of hearing is necessary in order to comply with due process before a Section 8 lease can be terminated for cause. Furthermore, the court believes it necessary that the hearing take place before the deprivation is effected. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Since the individual interest, the risk of erroneous deprivation, and the governmental interest in the present case are similar to the interest in *Goldberg*, the court finds that the hearing in the present case must conform to all of the procedural protections found necessary by the Supreme Court in *Goldberg*. The key concept guiding the provision of a hearing in this case must be to provide a hearing at a meaningful time to be held in a meaningful manner. *Goldberg*, 397 U.S. at 267.

The court does not believe, however, that GRFA must provide an administrative hearing in Georgia in order to

provide a meaningful hearing at a meaningful time. The court has looked to Georgia law and found an existing procedure that is both appropriate to protect the property interest of plaintiffs in this case as well as constitutionally adequate. Furthermore, the existing procedure found in Chapter 61-3 of the Georgia Code represents a well-struck balance between the factors to be considered here. First, as discussed below, the state court proceeding meets the requirements of due process and allows the Section 8 tenant to adequately present his case to a state court judge prior to a threatened eviction. At the same time, the state court proceeding and the institution of state courts are already available and existing. Therefore, no further commitment of state resources not already contemplated and provided is required by this alternative. GRFA need not commit further resources or divert existing resources into providing hearings since the state court system is presently available. The procedure dictated in the Georgia Code is consistent with the height of due process concerns, and as a full evidentiary and adversary proceeding complete with a jury, it represents the best available truth-finding device that has been yet required by a court under the due process clause.

The Georgia proceeding does allow for a determination of good cause for lease termination. The statute explicitly provides that a landlord may use the procedure when a tenant fails to pay rent when due or holds over after a lease had ended. Thus, the statute defines cause as a failure to pay rent as well as a material breach of a lease that would cause the lease to terminate and make continued occupancy by the tenant a hold over situation. Ga.Code Ann. §61-301. It is appropriate to defer to state law for a definition of good cause even though the Section

8 program is of federal origin. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Since the court defers to state law to define good cause, deference to state courts with their accumulated expertise in state law is a wise course.

The Georgia statute does not permit a lease termination at the landlord's will absent a valid clause in the lease permitting termination at will. Since a clause permitting the landlord to terminate at will would be invalid in the Section 8 context, the Georgia statutory procedure could not be used to effect a termination without good cause. Thus, the court is not disturbed by the criticism of using a state court proceeding expressed in *Owens v. Housing Authority*, 394 F.Supp. 1267 (D.Conn. 1975) and *Brown v. Housing Authority*, 340 F.Supp 114 (E.D.Wis.), *aff'd*, 471 F.d 63 (7th Cir. 1972). Nor is the Georgia procedure flawed in limiting the availability of constitutional defenses or appeal to a higher state court.

Because the Georgia proceeding takes into account the interest to be protected under the Existing Housing Program, the court finds that it is an adequate protection for Section 8 tenants. *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Anderson v. Denny*, 365 F.Supp 1254 (W.D.Va. 1973). Of course, the adequacy of state proceedings is a question of federal law in this case, *Vitek v. Jones*, 445 U.S. 480 (1980), but the court believes the Georgia proceeding provides greater protection than the eviction proceeding approved by the Supreme Court in *Lindsey v. Normet*, 405 U.S. 56 (1972). In that case, the Court approved an Oregon statute providing for summary proceedings to be held no later than 6 days after service of process absent a posting of security and for the limitation of issues at trial to whether or not a default had occurred.

The Georgia procedure is not truncated either as to time, Ga.Code Ann. §61-303, or as to issues. Furthermore, the Georgia statute is without the pernicious equal protection violation contained in the Oregon statute that a losing tenant post double-bond to appeal. Ga. Code Ann. §61-306.

This state court option also furthers the congressional purpose of allowing families assisted under the Section 8 program to function as non-assisted families in the private housing market. Since the procedure in Chapter 61-3 of the Georgia Code would have to be followed by a landlord for a tenant in the unassisted private housing market, using the same procedure for a Section 8 lease is presumably consistent with congressional purposes. Of course, the 30 day termination clause, which is forbidden in the context of the Section 8 Existing Housing Program, could be used to terminate a lease, create hold over status, and trigger the Chapter 61-3 procedure in the case of an unassisted tenant. Aside from prohibiting the 30 day termination clause, which this court has found that Congress intended to do, the Section 8 family would function exactly as does an unassisted family. The Georgia procedure, then, is both constitutionally adequate and statutorily preferable.

Of course, the statute creating the Section 8 program still requires the PHA to review a landlord's request for lease termination for good cause. Despite the fact that due process must occur before a Section 8 family can be finally deprived of its lease and evicted, GRFA cannot ignore the congressional mandate to review a landlord's request. If it finds no good cause, it cannot authorize the termination, hold over status will not arise, and the landlord cannot gain an eviction order in state court without

challenging the validity of GRFA's denial of his request. GRFA must exercise due care in discharging its statutory responsibility. The court, however, declines to specify a particular procedure by which the Authority should comply with the statute, but the court does hold that GRFA need not have a separate hearing on the question of whether or not the landlord has good cause for termination before it authorizes a termination or before it issues a notice to evict. Neither justice nor due process of law require that two hearings be held. *Goldberg*, 397 U.S. at 267 n.14. Since state law provides a proceeding adequate to determine if good cause for termination exists before a deprivation can occur, GRFA is relieved from the burden of providing a hearing that would be redundant and wasteful of social resources.

The court's order minimizes the burdens on the private landlord and on the state while protecting the property interest of Section 8 tenants. Since the Section 8 owner would have to go to court in Georgia anyway to evict a tenant who did not acquiesce in the eviction, the "landlord would be spared the burden of two hearings and he would be assured of being able to evict any tenant who was violating a material lease provision or state law." Klein & Schrider, *supra* at 348. An argument might be made that relying on the Georgia procedure, rather than a summary administrative procedure, in some cases may be adverse to public health and safety or to the well-being of other tenants. The Georgia procedure provides for expedience, however, and the state courts presumably would be aware of the need for haste when that need existed. Ga.Code Ann. §61-303.

The court's solution to this problem is arguably flawed by leaving the task of evolving doctrine which defines

good cause for a federal program to state courts. Note, *supra* at 908-09. This court believes, however, that state courts are the appropriate forum to develop a doctrine of good cause for lease termination if one need be developed. The Georgia statute contemplates such a good cause doctrine, Ga. Code Ann. §61-301, and the federal law seems to contemplate that Section 8 tenants should be subject to the state substantive law of landlord-tenant relations. Finally, the judicial process for holdover evictions in the superior courts of Georgia is subject to review by a higher state court, and in the event of misapplication of federal law, may be reviewed by the Supreme Court of the United States.

It has also been suggested that requiring state court litigation will increase the cost to the parties of dispute resolution. Assuming this to be true, the court is not convinced that requiring the parties to bear this own costs is unwise. Requiring the parties to bear their own costs in settling their own disputes in state court rather than judicially requiring all the citizens of Georgia to subsidize an administrative hearing and dispute resolution procedure, either at the cost of additional funding to or in decreased availability of rent subsidies, has the advantage of placing the financial burden of dispute resolution on the parties who are best able to avoid requiring the state to intervene in their private dispute. The court is unwilling to require the citizens of Georgia to provide a dispute resolution mechanism beyond the state court system that they have already provided in order to keep the peace. Of course, tenants are unlikely to be able to hire private legal assistance in defending an action brought under section 61-301 of the Georgia Code. Tenants, however, will have access to legal assistance for which the state

and its citizens have already provided funding. The resources so committed will be further strained by defending hold over actions, but the due process clause does not require the public to unwillingly commit further resources to this purpose. *Goldberg*, 397 U.S. at 270.

Finally, the court is unconvinced that private landlords will be unduly burdened by requiring them to use the Georgia proceeding against tenants holding over. Since the private landlord would be forced to resort to the same procedure against a tenant unassisted by Section 8 subsidies, the private sector is no more attractive than the Section 8 Existing Housing Program, at least as to eviction procedures. Although termination at will is permissible in a private lease but not in the present Section 8 context, the court believes Section 8 landlords are the recipients of other benefits that, on the whole, counterbalance this inconvenience. At worst, the difference in attractiveness, is not so great as to result in a mass exodus of private landlords from the Section 8 Existing Housing Program.

IV. CONCLUSION

On June 30, 1980, this court issued and stayed a preliminary injunction against defendants pending a hearing at which defendants had the opportunity to show cause why the injunction should not be made permanent. That hearing was held on August 27, 1980, and the court has carefully considered the briefs and arguments presented. Based on the foregoing reasoning, the court vacates its June 30 injunction and order insofar as it conflicts with the present order. Since the court has found that plaintiffs are adequately protected by state court proceedings,

no injunction will issue, and plaintiffs request for injunctive relief is hereby DENIED. Until it has evidence to the contrary, the court assumes that defendants, most of whom are officers or agencies of the state or federal governments, will comply with its order. *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964).

In conclusion, plaintiffs' motion for summary judgment is GRANTED and declaratory relief is GRANTED as set forth above in accordance with the opinion of the court.

All other motions pending in this case not resolved by this order are now moot and are therefore DENIED.

So ORDERED this 22nd day of December, 1980.

/s/ ROBERT H. HALL

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed in Clerk's Office, U.S.D.C. – Atlanta, June 30, 1980, Ben H. Carter, Clerk; By: MH, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KATHERINE JEFFRIES, on behalf of herself and all others similarly situated, *Plaintiff*, vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY; Et Al., *Defendants.*	CIVIL ACTION NO. C79-1349A

ORDER

This class action suit for injunctive and declaratory relief challenges the actions of the defendants under the National Housing Act, as amended by the Housing and Community Development Act of 1974. 42 U.S.C. §1437 (f). The parties have stipulated a number of facts and have submitted cross-motions for summary judgment. The defendants are the Georgia Residential Finance Authority (GRFA) which administers the existing housing rent supplement program in Georgia, some of its administrators, the Secretary of Department of Housing and Urban Development, other federal officials, and the landlord of the named plaintiffs.

Before considering those cross-motions, the court must dispose of several preliminary motions made by the state defendants.

The state defendants have moved the court to dismiss

the action on the ground that the court lacks jurisdiction of the subject matter. If any of the grounds for subject matter jurisdiction urged by the plaintiffs is valid, then the court can assume jurisdiction of this case. The plaintiffs have alleged that the defendants have violated the due process clause of the Fourteenth Amendment, the statute providing that only the agency may give a tenant notice-to-vacate, 42 U..C. §1437f(d)(1)(B), and the implementing regulations. 24 C.F.R. §882.215. The claim that the defendants have acted to deprive them of rights secured by the constitution and federal statutes states a cause of action under 42 U.S.C. §1983. Subject matter jurisdiction for alleged deprivations of constitutional rights is conferred on this court by 28 U.S.C. §1343(3). The only hurdle the plaintiffs must cross is showing that their constitutional claim is substantial under the test stated in *Hagans v. Levine*, 415 U.S. 528 (1974). The plaintiffs' due process claim is that they are deprived without due process of their entitlement to a year's occupancy under a housing program created by a federal statute. This court cannot say that this novel claim is frivolous or insubstantial or that prior cases foreclose a decision in favor of plaintiffs. Because the constitutional claim is properly within the court's subject matter jurisdiction, this court has pendent jurisdiction over the plaintiffs' statutory and regulatory claims.

The state defendants have also argued that there is insufficient state action in this case to found subject matter jurisdiction under the Fourteenth Amendment and 42 U.S.C. §1343. This claim is without merit as the activity of the Georgia Residential Finance Authority (GRFA), admittedly a state agency, is extensive. The state defendants' reliance on recent Supreme Court decisions is misplaced; the entanglement of the state in the administra-

tion of the existing housing supplemental rent program is sufficient to establish state action under *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

In addition, 28 U.S.C. §1331(a) gives the court jurisdiction of civil actions which arise under federal law and which are brought against federal officials, regardless of jurisdictional amount. The plaintiffs have sued to enjoin the Secretary of HUD from implementing a regulation which conflicts with a statute. Since the court has jurisdiction of this claim, it has pendent jurisdiction of the claims against the state defendants.

The state defendants have also asserted that the plaintiffs have failed to state a claim upon which relief can be granted on the theory that there is no statute which authorizes the plaintiffs' cause of action. The court finds that the plaintiffs may proceed on a cause of action implied from the Housing and Community Development Act of 1974 or under 42 U.S.C. §1983.

The state defendants have also moved for judgment on the pleadings for purposes of the class allegation for failure to join an indispensable class of defendants, i.e., all landlords in the program. In other words, the state defendants are asking the court to de-certify this case as a class action. When the court certified this case as a class action, the state defendants raised no objection on this ground. The court finds that it will be able to accord complete relief to all of the parties without joinder of a defendant class of landlords. In the court's opinion, this case is not a challenge to any action by the landlords but is a challenge to the regulations promulgated by HUD and the supervision of the program by GRFA. Under that view of the case, the landlords are not an indispensable class.

The court will now consider the cross-motions for summary judgment filed separately by the plaintiffs, the federal defendants and the state defendants.

The plaintiffs have challenged a HUD regulation as being in fatal conflict with the statute. The statutory provision is found in 42 U.S.C. §1437f(d)(1) which provides, "Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that (B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy."

The regulation implementing this provision provides: "The Owner shall not evict any Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner. The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the Family may, within the same period, present its objection to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease. The PHA shall notify the Owner and the Family of its determination within 20 days of the date of the notice to the Family, whether or not the Family has presented objections to the PHA. If the Owner has not received a response from the PHA within 20 days, he shall telephone the PHA and shall be informed by the PHA

whether a notice of the termination has been mailed. If the PHA informs the Owner that no notice has been mailed within the 20 day period, the PHA shall be deemed to have authorized the eviction." 24 C.F.R. §882.215.

The regulation is in conflict with the statute for several reasons. First the regulation purports to allow the owner to give the family a "written notice of the proposed eviction." The statute however only gives to the owner the right to request the agency to be allowed to terminate the tenancy ("make representation to the agency for termination of tenancy"). Further, the statute requires the agency to give the notice to vacate, but the regulation specifically allows the agency to avoid sending any notice through the lapse of time. Thus, a family could be evicted based solely on written notice from the owner and the lapse of time. The family would never have received a notice to vacate from the agency which is required by the statute. The court accordingly finds that the regulation violates the statute. This conclusion is supported by the decision of a district court which has enjoined HUD from implementing this regulation. *Brown v. Harris*, Case No. C-79-0595- WAI(SJ) (N.D.Cal. Feb. 28, 1980).

The plaintiffs also argue that the statutory scheme and lease create for them an entitlement to a year's occupancy which is a property interest within the meaning of the due process clause. They contend that GRFA can authorize a landlord-initiated, mid-term lease termination only for cause and after observing procedural safeguards required by the due process clause.

Before examining the issue of the existence and scope of a tenant's property interest, the court will return to the issue of state action—an issue touched upon briefly in the discussion of subject matter jurisdiction. If no state

action exists, then the plaintiffs may not rely upon the due process clause. As the court indicated earlier, the involvement of GRFA in the rent supplement program for existing housing is extensive. GRFA must certify tenant eligibility and determine which landlords may participate in the program. The agency inspects housing units to determine which can be occupied by participating tenants and enters into contracts with individual landlords. The rent supplement checks are sent directly from GRFA to the individual landlord. More importantly, Congress envisioned some role for GRFA in lease terminations since only the public housing agency is entitled to send the notice to vacate. 42 U.S.C. §1437f(d)(1)(B). The court concludes that sufficient state action exists to invoke the protections of the fourteenth amendment.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), do not require a contrary result. *Flagg Brothers* held that there was no state action when a warehouseman sold a debtor's goods which were in his possession to satisfy a lien for unpaid storage charges. A state law authorized such sales. *Jackson* found no state action when a private electrical utility terminated services even though the utility was licensed by the state and given virtually a monopoly status. These two cases involve private actors whose relationship with the state is not close enough to create state action. In this case, however, the public housing authority has the sole right to issue the notice to vacate. This activity is sufficient state action even though the public housing authority is clearly not the landlord.

Even when state action is involved, the person invoking the due process clause must show the existence of a protected interest—life, liberty or property. It is well

settled that even where state action is present, if no entitlement is created, then deprivation without procedural safeguards does not offend the due process clause. For example, in *O'Bannon v. Town Court Nursing Center*, 48 U.S.L.W. 4842 (1980), the Supreme Court held that Medicaid provisions conferred no property right on nursing home residents to continued residence in the nursing home of their choice when the home was decertified. In *Bishop v. Wood*, 426 U.S. 341 (1976), the Supreme Court held that by state law and local ordinance, a policeman could be fired without cause because the state law did not create a legitimate expectation of continued employment. *See also Vitek v. Jones*, 48 U.S.L.W. 4317 (1980) (holding that constitutionally protected liberty interest created by state statute). The plaintiffs assert that the statute, lease and regulations create for them a legitimate expectation of one year's occupancy.

In this case, the statute provides that each contract to make assistance payments between a public housing authority and an owner of existing housing "shall be for a term of not less than one month nor more than one hundred and eighty months." 42 U.S.C. §1437f(d)(2). 24 C.F.R. §882.107(b) provides: "The lease shall be for not less than one year nor more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party. The term of the lease shall be as agreed by the Family and the Owner, subject to the limitations of the preceding sentence. The term of the Contract [between the public housing authority and Owner] shall be for the term of the Lease . . ." Provision is also made for holdover tenants which is not challenged in this action.

GRFA has a standard form lease with an addendum

which was used as the lease for the named plaintiffs in this case. The addendum contains the HUD regulation on eviction which, as this court has held, fails to comply with the statute. The standard form lease in paragraph 1 provides, "The Lease shall be for not less than one year nor more than three years but may be terminated upon 30 days advance written notice by either party." This language is authorized by 24 C.F.R. §882.107(b).[1] All the leases of the named plaintiffs were for one year.

The court finds that the leases are for one year and that the plaintiffs have a valid expectation of occupancy for one year. The more difficult hurdle for the plaintiffs to cross is whether the expectation is for one year's occupancy which can be unilaterally terminated by the owner *without cause* so long as the 30 day notice requirement is met or whether the expectation is for one year's occupancy terminable with 30 days notice and for *good cause* only.

The question is a close one, and the statute provides little guidance, but on balance, the court finds that the tenants have a ligitimate expectation that the lease will be only terminated for cause. This expectation is created by the statutory provision that the "owner [has] the right to make representation to the agency for termination of tenancy." Only the agency can give the "notice to vacate." This implies that the owner must seek approval

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[1] The plaintiffs have not challenged the one-year lease duration requirement created by the regulations as it is not in their interest to do so. The statute permits a one-month contract between the owner and PHA, 42 U.S.C. §1437f(d)(2), but the regulations key the duration of the contract to the duration of the lease, which must be for at least a year. 24 C.F.R. §882.107(b). The effect is that one month contracts, specifically allowed by Congress, are not permitted by HUD—another example of the agency's ignoring the plain meaning of the statute.

from the agency in order to evict a tenant.[2] The state defendants have argued that they have no duty in authorizing the lease termination but simply rubberstamp each request. This procedure, however, nullifies the role the agency has been given by Congress.

The plaintiff seeks to have cause defined as a material or repeated breach of the terms of the lease. The court defines cause as a breach of the lease that would entitle the landlord under state law to treat the lease as over.

Having determined that mid-term lease terminations can be effected only for good cause, then it is clear that the tenants have a property interest which is protected by the due process clause. The question then becomes, how much process is due?

First, the landlord may intiate an agency determination by making an application to terminate the lease. 42 C.F.R. §882.107(b). This is merely an application, not a notice to vacate. A copy should be sent to the tenant and should include a statement of reasons (cause). The notice should include not only the possibility of lease termination but also the procedure for challenging the proposed

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[2] The defendants have attempted to distinguish between lease termination and eviction. They admit that eviction requires some agency review, 24 C.F.R. §882-215, but argue that no agency review is required when the landloard terminates the lease (and presumably the agency terminates housing assistance payments). If this procedure were followed, the landlord/owner could always seek first to terminate the lease and then to evict. If lease termination without cause ended the involvement of the agency, then the tenant could not seek agency review of a subsequent eviction and would have to rely on state court proceedings. Thus, under the HUD regulations, the owner with 20 days notice could get rid of any tenant and preclude any agency review. The defendants have not explained how unbridled landlord discretion is authorized by the statute which states that the agency has the sole right to give notice to vacate. The lease termination provisions provide to owners a simple means of avoiding the eviction regulation.

termination. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1(1978).

Since GRFA must determine whether to give the notice to vacate, the procedure for challenging the proposed termination must be to some GRFA employee, who is a neutral fact-finder in this case. The tenant should be given an opportunity to present his case orally or in writing to the GRFA employee. The owner should also be able to present his facts to the GRFA employee. Both parties should be able to present witnesses and question the witnesses of the other party. The procedure should be *informal*. The rules of evidence should not apply, but either party should have the right to counsel.

If the GRFA employee decides to issue a notice to vacate, then it should include a statement of reasons. In no circumstances should failure to issue the notice to vacate be construed as an authorization for eviction.

The state defendants have argued that this lease was intended to be between landlord and tenant with as little state involvement as possible. The court is of the opinion that such a program might be a superior one to the one Congress has passed. The court cannot, however, ignore the plain import of the statute.

The court accordingly GRANTS in part and DENIES in part the plaintiffs' motion for summary judgment. The motions of the defendants are DENIED. The court enters the following preliminary injunction:

The defendants are enjoined from enforcing 24 C.F.R. §882.215 and from permitting owners to send to Section 8 program participants the notice to vacate.

The defendants are enjoined to permit landlord-initiated mid-term lease terminations only for cause.

The owner may initiate lease termination by applying to GRFA for lease termination. The application shall include a statement of reasons and of procedures by which the program participant may challenge the termination. A copy shall be sent to the tenant.

If the tenant seeks a hearing, a GRFA employee shall hold a hearing. The rules of evidence will not apply, but an attorney for either party may attend. Each party may speak on his own behalf, present witnesses, and question opposing witnesses.

Only GRFA may issue the notice to vacate and must include a statement of reasons.

On its own motion, the court STAYS the effect of this preliminary injunction. The parties are ordered to show cause why this preliminary injunction should not be entered as the permanent injunction in this case at a hearing to be held within 30 days. (The court will notify the parties of the exact date of the hearing later.)

Any motion for reconsideration is due within 15 days from the receipt of this order. Responses are due from opposing counsel within 5 days from the receipt of any motion to reconsider.

Any request to present evidence at the show cause hearing is due within 15 days of the date of this order.

So ORDERED this 30 day of June, 1980.

/s/ ROBERT H. HALL

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed in Clerk's Office, Jan. 28, 1980, Ben H. Carter, Clerk; By MH, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

KATHERINE JEFFRIES, ROSE HECTOR, EDDIE MAUDE FRANKLIN and BELINDA CLARKE, on behalf of themselves and all others similarly situated, *Plaintiffs,* vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY; et al., *Defendants.*	CIVIL ACTION NO. C79-1349A

ORDER

This suit was brought by Katherine Jeffries and other named plaintiffs as a class action against the Georgia Residential Finance Authority (GRFA), its director and several of its officials, the Secretary of the Department of Housing and Urban Development and Landlord R. F. Taptich for injunctive and declaratory relief for violations of the National Housing Act, 42 U.S.C. §1437(f). On January 3, 1980, shortly after transfer of this case from Judge Edenfield, an informal conference was held with all parties to resolve disputed discovery issues and to provide a framework for orderly treatment of the litigation. Although the parties at that time stated that it was not necessary for the court to enter an order summarizing their agreement, the plaintiffs have since initiated a "battle of letters" over the contents of the agree-

ment and have raised by motion several other issues. The court regrettably finds it necessary to enter the order which the parties stated was unnecessary.

Pending before the court on January 3 were the following plaintiffs' motions: (1) motion for temporary restraining order, (2) motion for expedited discovery, (3) motion for permanent class certification, (4) motion to compel, and (5) motion for preliminary injunction. Also pending was defendants' motion for a protective order. Through its order of December 21, 1979, the court had granted plaintiffs' motion to amend its complaint and plaintiffs' motion for conditional class certification.

At the January 3 conference, the parties agreed that the case presents issues of law and not issues of fact. Accordingly, the parties agreed to prepare jointly a statement of material facts. The stipulated facts, the parties agreed, would be submitted to the court on February 1, 1980, along with cross-motions for summary judgment. Reply briefs would be due within ten (10) days. The parties agreed that this method of handling the case meant that the motion for a temporary restraining order was withdrawn, and the court *could* consolidate the preliminary and permanent injunction motions and issue one final order in the case. The possibility of an evidentiary hearing was *not* foreclosed provided that the party seeking the hearing could demonstrate that it had lived up to its agreement to attempt to stipulate the facts.

The defendant landlord earlier in the course of the litigation agreed not to attempt to evict the named plaintiffs. However, as the plaintiffs' one-year leases expire, the landlord is not restrained from initiating dispossessory proceedings. After giving notice to the named plaintiffs, or if unable to reach the named plaintiffs after giving

notice to their counsel, the landlord may enter the apartments of the named plaintiffs to make repairs.

In its December 21 order, this court conditionally certified the class and defined it as follows:

> All GRFA Section 8 existing housing program participants who are renting a unit under the Section 8 program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice, and who are having their leases terminated, prior to the expiration of the term, without good cause and without adequate due process.

At the January 3 conference, the state and federal defendants expressed dissatisfaction with this definition of the class because it refers to "good cause" and "due process" which are the ultimate legal issues in the case. The plaintiffs also expressed dissatisfaction with this definition of the class because it refers to program participants who "are having their leases terminated." The number of tenants *presently* being evicted is a constantly changing number. Moreover, plaintiffs' view of the case is that the appropriate definition of the class encompasses tenants who have in the past been evicted or who may in the future be evicted as well as those currently being evicted without good cause and without adequate due process.

Plaintiffs indicated on January 3 that the requirement of numerosity has been the most difficult hurdle to cross in maintaining this case as a class action. The state defendants and plaintiffs agreed to stipulate from area administrative reports the number of landlord-initiated, mid-term lease terminations. The parties agreed that reports would be examined for a "reasonable time" in

the past and that the parties would attempt to reach a mutually acceptable definition of "reasonable time."

This agreement was accepted by the court and is hereby made the ORDER of the court. The agreement rendered moot all pending discovery motions including plaintiffs' motions for expedited discovery and to compel and defendants' motion for a protective order. Plaintiffs' motion for a temporary restraining order was withdrawn. Thus, only plaintiffs' motion for permanent class certification was left unresolved, and the possibility of an evidentiary hearing on the preliminary and permanent injunctions was left open.

Since the January 3 conference, plaintiffs have moved to amend their complaint by adding an additional party plaintiff, Betty Foster, pursuant to Fed. R. Civ.P. 15(a), 20 and 21. This motion is opposed by the state defendants. The proposed amended complaint alleges that Ms. Foster's Section 8 benefits were terminated by a GRFA employee who had determined that Ms. Foster's rental unit did not meet the quality standards for the Section 8 program. The original plaintiffs had alleged that GRFA followed neither HUD's regulations nor the statute which governs landlord-initiated, mid-term lease terminations. The attempt to amend the complaint would add a party plaintiff who had suffered a GRFA-initiated, not a landlord-initiated, mid-term lease termination. This additional party plaintiff does not present common issues of law or fact with the initial party plaintiffs. The additional plaintiff would inject wholly new legal and factual issues just prior to the time when plaintiffs and defendants had agreed to submit cross-motions for summary judgment. The motion to add a party plaintiff addresses itself to the discretion of the court and is DENIED.

The plaintiffs have also moved for an extension of time for discovery because "plaintiffs had anticipated eliciting facts to which the parties cannot stipulate from live testimony." This is the sole reason which plaintiffs have advanced in support of their motion, and the court assumes that plaintiffs mean that they had "anticipated eliciting facts from live testimony to which the parties cannot stipulate." The court had indicated at the conference of January 3, 1980, that it would not entertain further motions for discovery on either the issue of class certification or on the factual issues underlying the merits of the case unless the party could demonstrate why it had failed to reach agreement with opposing counsel. Because plaintiffs have not made this showing, their motion for an extension of time is hereby DENIED.

Plaintiffs have also filed a motion for the court to reconsider their agreement of January 3 and to reconsider the court's definition of the conditionally certified class. In an attempt to meet the valid objections of the plaintiffs and the defendants to the court's initial definition of the class, the conditional class certification is hereby altered, and the class redefined as follows:

> All GRFA Section 8 housing program participants who are renting, or who have rented a unit under the Section 8 program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice and who are having, or who have had, or who are threatened with, mid-term, landlord-initiated lease termination.

Plaintiffs have also asked that the court grant plaintiffs' outstanding motion to compel discovery and that the court withdraw its requirement that plaintiffs and

state defendants "stipulate class numerosity." These requests are DENIED. The agreement by the plaintiffs on January 3 rendered moot plaintiffs' motion to compel discovery. The court has not attempted to require plaintiffs and state defendants to stipulate the size of the conditionally certified class. Rather, the parties agreed that they would make a good faith attempt to stipulate the number of landlord-initiated, mid-term lease terminations, and that this number would serve as a basis for legal argument concerning the size and scope of the class without further need for class discovery. Because the court at this time is unable to determine whether or not plaintiffs and defendants have made a good faith effort to determine the number of landlord-initiated, mid-term lease terminations, the motion is DENIED; however, the plaintiffs may renew their motion later.

The state defendants have moved the court for additional time in which to respond to plaintiffs' motion for reconsideration of the conditional class certification and the cross-motion for summary judgment. The motion is DENIED. The court refuses to alter the schedule to which the parties agreed concerning cross-motions for summary judgment and reply briefs. The court notes that the redefinition of the class conditionally certified by the court has taken into account the defendants' objections voiced at the January 3 conference. The court does not wish to foreclose the defendants from responding to this redefinition. If the defendants move the court to reconsider the definition of the conditionally certified class ordered today, the court will then entertain a motion for an extension of time.

To summarize, the agreement of the parties made on January 3, 1980, is made the order of the court. This

agreement and order moots plaintiffs' motions for expedited discovery and to compel and defendants' motion for a protective order. Plaintiffs' motion for a temporary restraining order was withdrawn. Plaintiffs' motions for a preliminary injunction and for permanent class certification are pending. Plaintiffs' subsequent motions to extend discovery and to amend their complaint are DENIED. Plaintiffs' motion for reconsideration of the conditional class certification and of their January 3 agreement is GRANTED in part and DENIED in part. Defendants' motion for an extension of time is DENIED with leave to refile.

IT IS SO ORDERED this 28 day of January, 1980.

/s/ ROBERT H. HALL

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX E

[Filed in Clerk's Office, U.S.D.C. – Atlanta, December 21, 1979, Ben H. Carter, Clerk; By JW, Deputy Clerk]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KATHERINE JEFFRIES, ROSE HECTOR, EDDIE MAUDE FRANKLIN and BELINDA CLARKE, on behalf of themselves and all others similarly situated, *Plaintiffs*, vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY; et al. *Defendants.*	CIVIL ACTION NO. C79-1349A

ORDER

This civil rights action for declaratory and injunctive relief for alleged violations of the Housing and Community Development Act, 42 U.S.C. § 1437f, is currently before the court on plaintiffs' motions for conditional class certification pursuant to Rule 23(c)(1), Fed.R.Civ.P., and for leave to amend their complaint, Rule 15, Fed.R.Civ.P. Plaintiffs and defendants have also submitted several motions relating to discovery, but these motions will not be ruled upon until a conference is held with the parties.

Plaintiffs are participants in a federally financed program under which they are assisted in making payments on rental housing that they occupy. Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f, authorizes the Department of Housing and Urban Development (HUD) to make these so-called

Housing Assistance Payments to public housing agencies such as defendant Georgia Residential Finance Authority (GRFA), which agencies in turn make payments to owners of housing units who have contracted to provide housing for program participants.

More specifically, section 8 as implemented by regulations promulgated by HUD, 24 CFR § 882, operates as follows. Low-income families that are eligible for participation in section 8 receive a Certificate of Family Participation. 24 CFR § 882.102. This certificate enables local public housing agencies to receive housing assistance monies from HUD, which the agencies in turn use to make payments directly to owners of private housing on behalf of program participants. Each section 8 participant must locate his or her own housing unit, 24 CFR § 882.103 (a), which the local public housing agency must certify as complying with HUD regulations. 24 CFR § 882-109. The owner of the dwelling unit and the local agency then enter into a payment assistance contract under which the local agency agrees to pay a part or all of the rent for the unit and the owner agrees to lease the unit to the program participant. 24 CFR § 882.102. Finally, the participant enters into a lease of the premises with the owner. The lease must meet the approval of the local agency and conform to the standards set forth in 24 CFR § 882 App. I and II, before Housing Assistance Payments to the owner can commence.

Plaintiffs as participants in the above-described program are presently leasing privately owned housing units and are beneficiaries of Housing Assistance Payments being made to the owners of those units. The leases under which plaintiffs occupy their housing units contain the following provision: "The Lease . . . may be terminated

upon 30 days advance written notice by either party." This provision appears in Standard Lease Form number 8-900-1 of the GRFA and conforms with 24 CFR § 882.107(b), which states in pertinent part: "The Lease shall be for not less than one year nor more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party."

The owners of the housing units that plaintiffs occupy have now sought to terminate plaintiffs' leases pursuant to the above 30-day lease termination provision. Plaintiffs brought this suit for declaratory and injunctive relief and seek both as individuals and as representatives of the class of all participants in the GRFA section 8 program in Georgia to prohibit improper termination of Housing Assistance Payments. Plaintiffs attack the 30-day lease provision on several grounds. First, they claim that HUD's regulations governing termination are in direct conflict with 42 U.S.C. § 1437f(d)(1)(B)[1] and that furthermore GRFA does not even follow the procedures established by the allegedly void regulations. Second, plaintiffs allege that HUD has failed to enforce its regulations requiring local public housing agencies such as GRFA to establish a complaint and appeal procedure, thereby denying plaintiffs' right to due process under the fifth amendment. Finally, plaintiffs contend that program participants have a right to at least one year's occupancy under 42 U.S.C. § 1437f and 24 CFR § 882 and that the 30-day termination provision, absent a good cause requirement, violates this right.

1. Plaintiffs now move the court for conditional class

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[1] This section states in part: "[T]he agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy."

certification pursuant to Rule 23(c)(1), Fed.R.Civ.P., which provides in pertinent part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Plaintiffs define the class that they seek to represent as "[a]ll present and future GRFA Section 8 Existing Housing Program participants." *E.g.*, Plaintiffs' Response to State Defendants' Opposition to Plaintiffs' Motion for Conditional Class Certification, at 2. They have further proposed that a sub-class be defined as follows:

> All GRFA Section 8 Existing Housing Program participants who are renting a unit under the Section 8 Program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice, and who are having their leases terminated, prior to the expiration of the term, without good cause and without adequate due process. [*Id.*]

Both state and federal defendants have objected to conditional certification of plaintiffs' proposed class on the ground that plaintiffs have not satisfied the requirements of Rule 23(a), Fed.R.Civ.P.[3] Under Rule 23(a), the court may allow an action to proceed as a class action if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the

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[3] Apparently neither group of defendants contests plaintiffs' allegation that their action falls within the scope of subsection (2) of Rule 23(b), which creates requirements for class action suits in addition to those imposed by Rule 23(a).

representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Although defendants raise some legitimate issues as to whether plaintiffs satisfy the requirements of Rule 23(a), the court concludes that the class should be tentatively certified so as to allow class discovery to commence. That class can now be best defined as follows:

> All GRFA Section 8 Existing Housing Program participants who are renting a unit under the Section 8 Program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice, and who are having their leases terminated, prior to the expiration of the term, without good cause and without adequate due process.

Further discovery should produce the necessary facts upon which the court can determine the existence and scope of the class and whether injunctive and declaratory relief is appropriate for the class as a whole. *See Scott v. Parham*, 69 FRD 324 (N.D.Ga. 1975) (Edenfield, J.). Accordingly, plaintiffs' motion for conditional class certification is hereby GRANTED.

2. Plaintiffs next move to amend their complaint, Rule 15(a), Fed.R.Civ.P. Inasmuch as this motion has not been opposed and the court finds that justice will best be served by granting leave to amend, plaintiffs' motion for leave to amend their complaint is hereby GRANTED.

So ORDERED, this 21 day of December, 1979.

/s/ ROBERT H. HALL
ROBERT H. HALL
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7389

D.C. Docket No. C79-1349A

KATHERINE JEFFRIES, EL AL.,
Plaintiffs-Appellees,

versus

GEORGIA RESIDENTIAL FINANCE AUTHORITY, HARRIET J. MACKLIN, ETC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 14, 1982

ISSUED AS MANDATE: AUG. 5, 1982

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*Honorable Joe Ingraham, Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.